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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF MORGAN CITY,
Petitioner,
v.
SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., and THE UNITED STATES OF AMERICA, through the RURAL UTILITIES SERVICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE LOUISIANA ENERGY AND POWER AUTHORITY IN SUPPORT OF THE PETITION

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BRIEF AMICUS CURIAE OF THE LOUISIANA ENERGY AND POWER AUTHORITY IN SUPPORT OF THE PETITION

Louisiana Energy and Power Authority, by its authorized legal representative, submits this brief amicus curiae in support of the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit filed by the City of Morgan City, Louisiana, on June 28, 1995.

The Court has extended the time for the United States to file its response until August 30, 1995.

The Louisiana Energy and Power Authority, ("LEPA") is a political subdivision of the State of Louisiana which was created by the Louisiana Legislature in 1979. La. Rev. Stat. 33:4545-1 through 4545-37. Under Rule 37.5 of the Rules of the Supreme Court, it is not necessary for LEPA to seek the consent of the parties to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

LEPA's basic mandate is to provide bulk power supply to its member municipalities which own and operate their own retail electric distribution systems. At present, nineteen Louisiana municipal systems (including Morgan City) are members of LEPA, and most of these systems rely entirely upon LEPA for their bulk power supply. LEPA has an interest in this proceeding because the Fifth Circuit's decision will artificially constrain the size of its system and thereby impair its ability to take advantage of available economies of scale. In addition, LEPA believes that its status as a creature of the Louisiana Legislature may give it unique perspective on the state policies which affect the provision of retail electric service in Louisiana.

ARGUMENT

The three judges dissenting from the denial of rehearing have provided the sharpest statement of the basic reason why the decision below warrants review: In the delicate and complex balance of federal and state interests the decision below represents "a breathtaking federal power grab by REA from local government units. . ." (Petition 28a).

LEPA believes that the decision below would drastically impair state power to regulate the provision of retail electric service in two fundamental respects: (1) the decision represents an effective ban on the exercise of

the eminent domain power against an unwilling rural electric cooperative and (2) the panel's "frustration of purpose" rationale would logically extend to the preemption of many other traditional exercises of state power in the regulation of retail electric service.

1. As the state agency responsible for assuring that municipal electric systems in Louisiana have access to an economical bulk power supply, LEPA has seen how critically important the eminent domain process is to the continuing viability of municipal electric service.

In Louisiana the municipality is not an arbitrary geographic unit of government. Municipal governments exist to serve people who are clustered together in urban communities. With population growth, urbanization has often spread outside the existing corporate boundaries of Louisiana municipalities. In these situations, Louisiana law enables a municipal government to expand its boundaries through annexation. Such an annexation process has taken place in the area which is the subject of this lawsuit; and the residents of the annexed area are now full-fledged participants in the civic life of Morgan City.

Louisiana has designed its eminent domain law, La. Rev. Stat. 19:101 *et seq.*, to work in concert with the annexation law so that the benefits and burdens of ongoing municipal programs can be shared by all citizens uniformly. If a city operates a municipal electric system, the Louisiana eminent domain law makes it possible for that system to serve all city residents. This is desirable for political as well as economic reasons. The operation of a municipal electric system is almost always the subject of intense political scrutiny and debate. It will be much more difficult for the political process to arrive at effective consensus about the kind of service to be provided if one substantial segment of the citizenry is excluded from any use of that service.

The Court of Appeals panel decision effectively mandates that the policies which Louisiana has adopted to

deal with the process of urban growth must give way to a federal purpose of protecting rural electric cooperatives from the economic harm which could result from an expropriation.

Contrary to the statement of the panel in denying rehearing (Petition, Appendix C, p. 25a), it seems clear that the panel has adopted a *per se* rule. In order to invoke a "frustration" preemption, the rural electric coop need do no more that show that (1) the municipal system proposes to take one of the more densely populated portions of the coop system and (2) there are likely to be future takings. When areas on the fringes of cities become urbanized, it is true—virtually as a matter of definition—that they are more densely populated than rural areas. The first condition to invoking preemption amounts to no condition at all.

It is similarly true that unless there is some unusual reason to expect that urban growth will come to a complete halt, any particular instance of annexation and expropriation is likely, at *some* later point, to be followed by another. Displaying a fundamental hostility to the Louisiana policy on urban growth, the Court of Appeals panel states: "Permitting Morgan City to condemn these 252 users would pave the way for piecemeal erosion of other high-density service areas adjacent to Morgan City and other cities." (Petition, Appendix A, p. 10a). It is one thing to evaluate all scheduled expropriations together to determine their likely impact on the coop. But it is quite another thing to treat a minor loss of revenue as significant because it is likely to be followed at some undetermined later point by another revenue loss. Under the Court of Appeals approach, neither the actual loss nor the putative future loss needs to be evaluated within the framework of the cooperative's offsetting load growth. Moreover, the Court of Appeals panel appears to employ a strong presumption that the Louisiana expropriation courts *will not* adequately compensate the coop for its

losses. A "frustration of purpose" standard that easily met fairly deserves to be called *per se*.*

2. The Court of Appeals' conclusion that the Louisiana law of eminent domain should be preempted because of the possible harm to the financial interests of a rural electric cooperative has further implications which warrant this Court's immediate attention. The structure of the retail electric utility industry in Louisiana, as in most states, has largely been shaped by state—rather than federal—policy decisions. Thus, it is the states which have determined in the first instance whether to provide for the organization of rural electric cooperatives (7 U.S.C. § 904); whether to assign the cooperatives and the other retail suppliers exclusive service territories or some more limited form of protection from competition; whether to regulate the maximum level of retail rates; whether to exercise control over acquisitions of bulk power supply in order to assure that least-cost strategies or desired conservation policies are pursued.

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* It is notable that the two undisputed facts which the Court of Appeals found to be sufficient to justify summary judgment in REA's favor would not have been sufficient to satisfy the Government's suggested standard. The Government had argued that summary judgement was appropriate if the undisputed facts showed (1) that Morgan City proposed to take one of the denser portions of the SLECA system (2) that future expropriations from SLECA are likely; and (3) that Cajun, the wholesale power supplier, is in poor financial condition. Brief for the United States, filed Sept. 21, 1993, pp. 26-27. The Court of Appeals decision makes no reference to this third element.

The Government's approach had been suggested as a way around a serious procedural problem—that the district court had accorded the REA Administrator's ad hoc and one-sided "proceeding" the unwarranted benefit of an "arbitrary and capricious" review standard. Although the Court of Appeals panel stated that it was applying a summary judgment standard, there are clear indications that the panel continued to treat the Administrator's contentions about the likely effects of the expropriation as "findings" to which deference was due. (See Petition Appendix C, pp.26a-27a.)

If federal courts are to be in the business of determining on their own when state laws or regulations frustrate a federal purpose, it is obvious that the result will often depend on the definition: what is the federal purpose? In this case the Court of Appeals has found a purpose of all-encompassing generality. Congress "enacted the REAct for the purpose of ensuring that electric service would be provided to rural America." (Petition Appendix A, p. 6a) "Congress has declared the federal purpose to electrify the American farm." (*Id.* at 10a).

With such a purpose as its touchstone, a federal court would be obliged to strike down any state law or regulation which changed the *status quo* to the detriment of a distribution cooperative or its "generation and transmission cooperative" supplier. Suppose, for example, that the Louisiana legislature, finding that there needs to be more competition in retail electric sales, amended the existing Louisiana law against "utility switching" (La. Rev. Stat. 45:123) so as to permit free competition for the business of all retail customers, old or new. Rural electric cooperatives might well be able to make out a case that such a change in the law would have a particularly adverse effect upon them because they are the highest-cost suppliers. Under the Fifth Circuit's rationale, Louisiana would have frustrated a federal purpose.

The Fifth Circuit's reasoning strikes a fatal blow at the heart of the traditional state police powers which this Court, in both *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983), was at great pains to preserve from overbroad preemption claims. The Fifth Circuit was led to this untenable ground by a combination of errors, any one of which would be important enough to warrant the attention of this court: 1) the failure to invoke the strong presumption against preemption; 2) the failure to recognize that

the Rural Electrification Act, 7 U.S.C. § 913, itself contains a clear direction that the general policy of promoting rural electrification must be accommodated with the process of urban development; 3) the failure to recognize that under *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the interests of the federal government as a lender in subsidized loan programs are not entitled to broad protection from the normal operation of state law.

CONCLUSION

Morgan City's petition for writ of certiorari should be granted.

Respectfully submitted,

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